IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.209 of 1987

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT
Versus
VAGHARI VASRAM @ VASANT ISHWARBHAI INDRAD TAL.KADI

Appearance:
1. Criminal Appeal No. 209 of 1987
MR KP RAVAL, APP for Appellant
(SHANTILAL M SHAH) for Respondent No. 1-2,4
MR KB ANANDJIWALA for Respondent No. 1
ABATED for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 20/10/2004

ORAL JUDGEMENT
(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

By filing instant appeal under Section 378 of the Code of Criminal Procedure, 1973 ("the Code" for short), the State of Gujarat questions legality of judgment dated December 22, 1986 rendered by the learned Sessions Judge, Mehsana, in Sessions Case No.46 of 1986 by which the respondents have been acquitted of the offences punishable under Sections 447, 504, 323, 302 read with Section 34 or 114 of the Indian Penal Code ("IPC" for short). It may be stated that during the pendency of the appeal, respondent No.3 expired and, therefore, the appeal against him has been disposed of as having abated by order dated June 22, 1988.

2. The facts emerging from the record of the case are as under:

Complainant Rajendrabhai Nathabhai Dantani is resident of village Indrad, Taluka Kadi. He is having agricultural land in the sim of village Dhanot, Taluka Kalol, District Mehsana. Just adjoining his land, there is orchard of respondent No.1. Rajendrabhai has made an open fenced compound near his land which is of common ownership of his and respondent No.1. Deceased respondent No.3 was intending to usurp the said common land and, therefore, on November 26, 1985 at about 8.30 p.m., respondent No.1, who was armed with a dharia, and respondent No.2, who was also armed with a dharia, and deceased respondent No.3 as well as respondent No.4, who were armed with sticks, had gone to the house of the deceased and demanded the common land from him and abused him. As deceased Shanti Natha had refused to part with the land, the respondents had assaulted him. The first blow was given by respondent No.1 with a dharia which was aimed on head of the deceased, but had landed on right parietal region as a result of which right ear of the deceased was cut whereas respondent No.2 had also aimed a blow on the head of deceased, but as the deceased had lifted his head the blow had landed on chin. Because of injuries sustained by him, the deceased had fallen down. A commotion had taken place as a result of which, Nathabhai Bijalbhai, who is father of the deceased, his brother Chandrakant, Babuji Maganji and his another brother Rajendrabhai had come rushing. Rajendrabhai was assaulted by deceased respondent No.3 as well as respondent No.4 with sticks when an attempt was made by him to save the deceased. After the incident, the deceased was removed to Government Hospital, Kadi, for treatment in a private truck. The Medical Officer of Kadi Hospital had informed Kadi Police Station on phone and, therefore, necessary entry was made in the register

by constable Pratapsinh Mangalsinh, who was in charge of Police Station. Thereafter, Rajendrabhai Nathabhai Dantani had gone to Kadi Police Station and lodged his First Information Report which was registered by the Police Officer in charge of Kadi Police Station. The investigation of the complaint lodged by Rajendrabhai was handed over to Manojkumar Vechatbhai Ozat, who was then Senior Police Sub Inspector of Kadi Police Station. The Police Officer in charge of Kadi police Station had also addressed a yadi to Executive Magistrate requesting him to record dying declaration of the deceased. PSI Mr.Ozat had visited the place of incident and taken steps to protect the same by posting a constable. On November 27, 1985, he had also drawn panchnama of place of incident and seized bloodstained earth as well as control earth from the place of incident. He had also recorded statement of Chandrakantbhai, Takhiben, i.e. wife of deceased, Nathabhai Bijalbhai, etc. On November 28, 1985, the respondents had surrendered before the Police with weapons and, therefore, they were arrested under a panchnama. During the course of treatment, the deceased succumbed to his injuries on December 3, 1995 and, therefore, inquest on the dead body of the deceased was held by PSI Mr.Ozat. He had also made arrangement for sending dead body to hospital for postmortem examination. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, the respondents were chargesheeted in the Court of learned Judicial Magistrate First Class, Kadi, for commission of offences punishable under sections 447, 504, 323, 302 read with Section 34 or 114 IPC. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Mehsana, for trial where it was numbered as Sessions Case No.46 of 1986.

3. The charge for commission of offences punishable under Sections 447, 504, 323, 302 read with Section 34 or 114 IPC was framed by the learned Sessions Judge against the respondents at Exh.3. The charge was read over and explained to the respondents who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Bhanushanker Premshanker Pandya as P.W.-1 at Exh.22; (2) Rajendrabhai Nathabhai as P.W.-2 at Exh.39; (3) Takhiben Shantibhai as P.W.-3 at Exh.41; (4) Chaturbhai Savabhai as P.W.-4 at Exh.42; (5) Nathabhai Bijalbhai as P.W.-5 at Exh.45; (6) Abhesing Gulabsing Gadhavi as P.W.-6 at Exh.53; (7) Jayesh Jivanlal Shah as P.W.-7 at Exh.58; (8) Dr.Sunilkumar Madanlall Lad as P.W.-8 at Exh.62; (9) Pratapsing

Mangalsin as P.W.-9 at Exh.64; and, (10) Manojkumar Vechatbhai Ozat as P.W.-10 at Exh.67. Documentary evidence such as; intimation given by Rajendrabhai Dantani to PSI that the deceased, who was his brother, had died on December 3, 1985 because of assault at Exh.11; panchnama of seizure of clothes of the deceased at Exh.12; inquest report at Exh.13; report of the Serologist at Exh.19; yadi addressed to the Executive Magistrate to record dying declaration to injured Shantilal at Exh.20; notification issued under Section 37(1) of the Bombay Police Act, 1951, at EXh.21; map of the place of incident at Exh.23; 7-12 extracts of Survey Nos.173, 174, 175, 176 of village Dhanot, Taluka Kalol, at Exhs.25, 26, 27, 28 respectively; dressing relating to land situated in the sim of village Dhanot at Exh.29; 7-12 extract of Survey Nos.49, 50, 144, 1041/1, 1042/2 of village Indrad, Taluka Kadi, at Exhs.30, 31, 32, 33, 34 respectively; dressing of land situated in the sim of village Indrad at Exh.35; extract from assessment register relating to property bearing No.4-5/1 belonging to Dantani Vasantbhai at Exh.36; extract from assessment register relating to properties bearing Nos.4/4 & 4/5 belonging to Ishvar Mohan at Exh.37; extract from assessment register relating to property at Exh.38; complaint of rejoinder at Exh.40; certificate of injury of the deceased at Exh.43; certificate of injury of Rajendrabhai at Exh.44; application by Kamuben wife of respondent No.2 filed before DSP Mehsana against the decease at Exh.50; report by Divisional Police Officer, to DSP relating to application filed by Kamuben at Exh.51; panchnama of place of incident at Exh.54; panchnama indicating seizure of weapons produced by the respondents at Exh.55; report of CT Scan at Exh.59; postmortem notes at Exh.63; telephone entry produced by Constable Pratapsinh at Exh.65; copy of entry made in the station diary at Exh.66, etc. was also produced in support of its case against the respondents.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the respondent the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In his further statement, case of respondent No.1 was that he was residing at Indrad and was serving in the office of Collector, Mehsana, by daily commuting from his village. It was further stated by him that he had sustained fracture in leg as a result of which, rods were planted and he was not able to walk without a crutch, and was not present at the time of incident. The case of the respondent No.2 in his further statement was that on the

day of incident, he had gone to flour mill in the village and had come back to his house at about 8.00 p.m. According to him, at that time, he had seen that deceased Shanti Natha had mounted on his wife and attempt made by him to free his wife from the clutches of the deceased had failed as a result of which, he had given a blow with a short thick staff on his head. It was further stated by him that because of the blow, the deceased had got up and gripped him and, therefore, his wife had given two to three blows of short thick staff to the deceased and, therefore, an attempt was made by the deceased to run away and in that process, he had tumbled over a water-pot and sustained injuries. It was further claimed by respondent No.2 that thereafter, he was not knowing as to what happened to the deceased. The case of respondent Nos.3 & 4 in their respective further statements was that they were not present at the time of incident.

5. On consideration of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that deceased Shantilal died a homicidal death, but it was not proved by the prosecution that the common intention of the respondents was to cause grievous hurt or death of deceased Shanti Natha. The learned Judge held that it was not proved by the prosecution beyond reasonable doubt that the respondents had caused injuries to the deceased by dharias and sticks as a result of which he had died nor it was proved by the prosecution that respondent No.1 had caused grievous injury with dharia by cutting right ear of the deceased. The learned Judge was of the view that no reliable evidence was adduced by the prosecution to prove that respondent No.2 had caused injuries by means of dharia on head of the deceased nor any evidence was adduced by the prosecution to establish that respondent Nos.3 and 4 had caused injuries to the deceased by giving stick-blows. It was further deduced by the learned Judge that the prosecution could not prove that abuses were hurled by the respondents to the deceased. In view of abovereferredto conclusions, the learned Judge has acquitted the respondents for the alleged commission of offences punishable under Sections 447, 504, 323, 302 read with Section 34 or 114 IPC by judgment dated December 22, 1986 giving rise to instant appeal.

6. This Court has heard Mr.K.P.Raval, learned Additional Public Prosecutor, as well as Mr.K.B.Anandjiwala, learned counsel of the respondents, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on

record with reference to broad and reasonable probabilities of the case.

7. In order to prove the case against the respondents, the prosecution has relied upon testimony of Rajendrabhai Nathabhai Dantani examined at Exh.39 and Takhiben Shantibhai examined at Exh.41. The motive for commission of crime, according to the prosecution, was dispute relating to land. However, the documents produced on record of the case at Exhs.30 to 34 would indicate that deceased respondent No.3 was in possession of the disputed land. It could not be brought on record by the prosecution that any litigation either civil, criminal or revenue, was pending between the parties relating to dispute of land. Under the circumstances, the learned Judge was justified in holding that the prosecution case that the deceased was assaulted because the respondents wanted the lands from the respondents is highly doubtful. This finding of the learned trial Judge could hardly be assailed by the learned Additional Public Prosecutor. Though in a case of direct evidence of eye witnesses, absence of motive has no importance, but it becomes relevant when direct evidence of eye witnesses is not found to be trustworthy. The prosecution had approached the Court with specific case that the motive alleged by it had prompted the respondents to assault the deceased, and failure to establish the same assumes importance on the facts of the case. Thus, absence of motive attributed to the respondents is a relevant factor and must be borne in mind while deciding instant appeal.

8. The learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, has recorded cogent and convincing reasons for disbelieving witness Rajendrabhai Nathabhai, which are to be found in paragraphs 10 & 11 of the impugned judgment. Though it was claimed by him that he was residing in the field itself just near the house of the deceased, cross-examination of Investigating Officer Mr.Ozat establishes that hut in which the complainant and his father Nathalal were residing was situated at a distance of 2000 ft. This makes the assertion of Rajendrabhai that he had an opportunity to witness the incident highly doubtful. It was claimed by three close relatives of the deceased that there was electric light near the place of the incident. However, the Investigating Officer has, in terms, admitted that there was no light outside the house of the deceased at all. Thus, the assertion made by three close relatives of the deceased stands falsified by the testimony of the Investigating Officer. It was claimed by witness Rajendrabhai that first blow was

inflicted by respondent No.1 on the deceased. However, this claim becomes doubtful if factors brought and proved on record are considered. Admittedly, respondent No.1 had no enmity worth the name with the deceased. Further, the record shows that respondent No.1 is staying at village Indrad whereas distance between the place of incident and village Indrad is roughly about two kms., and it is not probable that a person, who has sustained fracture in leg and is not able to walk without crutch, would leave his village and walk up to a distance of two kms. for the purpose of inflicting dharia blows on the deceased though he had no dispute with him. Rajendrabhai did not state in his complaint that deceased respondent No.3 and respondent No.4 had also assaulted the deceased with their respective sticks, but it is so stated by him in his substantive evidence before the Court. Thus, tendency to make exaggerations and involve persons falsely is evident on the part of Rajendrabhai. According to Rajendrabhai, respondent No.1 had aimed blow to cause an injury on head of the deceased, but the blow had landed on right parietal region as a result of which right ear was cut whereas respondent No.2 had aimed blow on head of the deceased, but as the deceased had raised his head, the blow had landed on chin. On careful scrutiny of testimony of Rajendrabhai, it becomes evident that it is his specific case that because of blows inflicted by the respondents, the deceased had sustained injuries on his head, but except swelling on his head, no other injury was found on the deceased. Thus, the testimony of witness Rajendrabhai does not get support from medical evidence. According to Dr.Parmar, examined at Exh.42, injury on parietal region could have been caused by fall or hard and blunt substance which makes the defence pleaded by respondent No.2 in his further statement probable. It is relevant to notice that witness Rajendrabhai has not claimed that he had seen the respondents with their respective weapons going towards the house of the deceased though it was falsely stated by him that he was residing just near the hut of the deceased. In order to project himself that he was an "eye witness", it was claimed by him that he was assaulted by deceased respondent No.3 and respondent No.4 with sticks. However, evidence of Dr.Parmar recorded at Exh.42 read with certificate of injury of witness Rajendrabhai produced at Exh.44 would indicate that he had merely found tenderness on left shoulder joint and that injury could have been caused by sharp and blunt substance. However, the medical evidence establishes that no external injury was visible at all. This falsifies the claim of witness Rajendrabhai that he was assaulted by deceased respondent No.3 and respondent No.4

with their respective sticks. Thus, regarding his own injury, witness Rajendrabhai does not get support from the medical evidence. For all the above reasons, this Court is of the opinion that the learned Judge of the trial Court was justified in disbelieving the testimony of witness Rajendrabhai.

9. Coming to the testimony of witness Takhiben, this Court finds that it was asserted by her that the respondents had come hurling abuses and demanded land situated in the sim of village Indrad. However, the record shows that those lands were in possession of deceased respondent No.3 and, therefore, her claim that the respondents were hurling abuses and demanding lands situated in the sim of village Indrad becomes doubtful. Further, it is the case of the prosecution that those lands were earlier in possession of Nathalal, who is father of deceased, and, therefore, the claim of this witness that the respondents had demanded the said lands from the deceased also becomes suspicious. Though this witness has stated in her testimony that respondent Nos.1 and 2 had caused injuries to the deceased by means of dharia, she has not stated that respondent Nos.3 and 4 had caused injury to the deceased by sticks. She has stated in her cross-examination that the Police Officer had recorded her statement on the day of incident after making inquiries about the light arrangement in her house, and that the Police Officer had come in the night of the next day and seized bloodstained earth, but this fact is not borne out from the testimony of the Investigating Officer. Her claim that respondent No.1 had inflicted blow on the middle of head of the deceased stands falsified by the medical evidence inasmuch as the medical evidence does not indicate any injury on the head of the deceased which could have been caused by a sharp cutting instrument. Though according to her, the incident had taken place in front of her house, no bloodstained earth was collected therefrom and, therefore, her testimony becomes doubtful. So also cogent and convincing reasons have been assigned by the learned Judge for disbelieving the testimony of witness Nathalal which are to be found in paragraph 13 of the impugned judgment. His case that when he had come out of his house, he had seen that the respondents were standing with their respective weapons and that thereafter, they had left the place of incidents on his entreaties, is highly doubtful. This witness has admitted that the lands situated in the sim of village Indrad were not in his possession. According to this witness, he was not knowing wife of respondent No.2, but this assertion cannot be believed because in order to avoid questions

which might be put to the witness regarding character of deceased Shantilal, he has stated that he was not knowing wife of respondent No.2. As noted earlier, bloodstained earth was not collected from the open land in front of house of deceased Shantilal, but was collected from a place near the well belonging to Rajendrabhai. Further, discovery of weapons pursuant to so-called disclosure statements made by the respondents while in police custody is also not reliable. The evidence of panch witnesses would indicate that those weapons were lying in the police station itself, but were not discovered by the respondents. The two independent witnesses, namely, Babuji and Ramaji, could not be examined by the prosecution for the reasons best known to it. The evidence on record establishes that there was darkness at the place where the incident had taken place and, therefore, the testimony of so-called eye witnesses becomes doubtful.

10. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As the Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and in view of the Court, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & ors. v. Bijendra Narain Chaudhary, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince this Court to take the view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be dismissed.

11. For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the judgment

which is impugned in the appeal. The bond, if any, executed by the respondents or their surety shall stand cancelled.

(J.M. Panchal, J.)

(M.C. Patel, J.)

Rajendra